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Going Against the Current: How Aereo's Online Streaming Left Copyright Laws Adrift

By: Vani Parti

Part I: Introduction

More than five million U.S. homes today have “Zero-TV.” Residents of those homes no longer watch traditional television offered by cable or satellite providers, but instead stream videos online through the Internet.¹ According to Nielsen’s 2013 Cross Platform Report, almost half of Americans under the age of thirty-five live in Zero-TV homes—evidencing an important change in the delivery of media.² Over the last several years, the shift towards dropping cable plans in favor of à la carte online streaming services has been attributed to viewers’ concerns about the high costs of cable television and disinterest in cable bundling.³ The rapid and broad expansion of the Internet TV has raised significant issues, which the legal system has attempted to solve through piecemeal decisions. One specific problem, addressed by the United States Supreme Court, is how the public performance right and the Transmit Clause of the Copyright Act apply to new emerging technologies.

In 2012, Chet Kanojia, with a team of engineers, lawyers, marketers and even an Olympic medalist launched a digital start-up, Aereo, transforming the way people watch

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Zero-TV Doesn't Mean Zero Video, NIELSEN, (Nov. 9, 2014, 10:04 AM)
<http://www.nielsen.com/us/en/insights/news/2013/zero-tv-doesnt-mean-zero-video.html>.

2

A Look Across Media: The Cross-Platform Report Q3 2013, NIELSEN, (Nov. 9, 2014, 10:14 AM)
<http://www.nielsen.com/content/corporate/tw/en/insights/reports/2013/a-look-across-media-the-cross-platform-report-q3-2013.html>.

3

Id.

television.⁴ This technology captured broadcasters' TV signals using thousands of tiny remote antennas and made them available in the cloud⁵ for consumers to watch television anywhere on any Internet-connected device, and most importantly without paying an expensive cable bill. Aereo's technology focused on the inherent right of any viewer to receive free over-the-air broadcasts by attaching an antenna to a TV and scanning for channels. The team, however, deliberately designed Aereo to fall squarely within a legal loophole that circumvents copyright laws. This loophole resulted from the current Copyright Act and a 2008 ruling by the Second Circuit.

In June 2014, in a 6-3 decision, the Supreme Court of the United States triggered Aereo's shutdown because even though its crafty workaround would have been arguably lawful, the petitioners, Broadcasters, would lose billions in retransmissions fees from cable companies if Aereo was allowed to exploit a legal loophole.

Although the United States Supreme Court effectively ended Aereo, Broadcasters' business model is in danger because Aereo users showed their willingness to forego cable and satellite for a small amount of money. Thus the question remains—does the Copyright Act confer a monopoly on Broadcasters that stunts budding technologies like Aereo, or do the goals of copyright warrant a different result?

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David Carr, *Aereo Case Will Shape TV's Future*, THE NEW YORK TIMES, (Apr. 20, 2014) <http://www.nytimes.com/2014/04/21/business/media/aereo-case-will-shape-tvs-future.html>.

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The cloud is defined as a communications network or a datacenter full of servers connected to the Internet, which allows remote data access and storage. *See* PCMAG DIGITAL GROUP, <http://www.pcmag.com/encyclopedia/term/39847/cloud> (last visited Jan. 1, 2015).

This Note addresses the current effort to solve the Transmit Clause problem: misinterpretation and misapplication of the 1976 Copyright Act to today's technology, such as Internet Television. Part II considers the origins and the evolution of the Copyright Act of 1976, the subsequent development of the Transmit Clause, and the Court's latest effort to resolve the statutory interpretation problems encountered with the Transmit Clause in *ABC, Inc. v. Aereo, Inc.* Part III suggests that Congress should amend the Copyright Act in view of technological, regulatory, and political perspectives. Part IV proposes a new licensing scheme and device-shifting exception for Congress to adopt in lieu of a new Copyright Act that would resolve the disparities in copyright law by favoring societal demands for current technology.

This Note concludes that the Supreme Court's interpretation of the Transmit Clause in *Aereo* unfairly discriminates against other uses of copyrighted works, particularly Internet TV, endangers the development of cloud computing technologies, and threatens to substantially limit the emergence of similar advanced technology available to the public at a cheaper cost.

Part II: Overview

A. Legislative History and Statutory Background

Rapid technological change is the fundamental force behind the development of modern copyright law. The earliest copyright laws were a reaction to the economic and cultural conditions caused by the Fifteenth Century technology of printing with movable type in Europe.⁶ When the United States adopted copyright laws, the Framers of the

Constitution recognized the need to reward “authors” and “maximize the welfare of society as a whole” through the economic incentive of granting a monopoly right for a limited time.⁷ Article I, Section 8 of the United States Constitution states that Congress shall have the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁸

The scope of copyright has greatly expanded over the past three centuries. Today, the Copyright Act of 1976 (the “Act”) grants six exclusive rights to copyright holders.⁹ Section 106 of the 1976 Act provides copyright owners the exclusive right “to do or to authorize” reproduction, distribution, adaptation, performance, display, and digital performance.¹⁰ Copyright owners can protect their rights against direct infringement by showing prima facie copyright ownership and an unauthorized exercise of one or more of their exclusive rights.¹¹ Similarly, copyright holders can enforce their rights against

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Copyright Act, 17 U.S.C. §§ 101-810; *see generally* CRAIG ALLEN NARD ET AL., THE LAW OF INTELLECTUAL PROPERTY 367 (3d ed. 2011) (detailing the history of copyright law and the Copyright Act).

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U.S. CONST. art. I, § 8, cl. 8.

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See generally Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified in various sections at 17 U.S.C.).

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17 U.S.C. § 106 (2014).

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Fox TV Stations v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1142 (C.D. Cal. 2012).

indirect infringement under secondary liability theories, including contributory and vicarious infringement.¹²

The Act was in part a reaction to the absolute freedom enjoyed by cable systems under judicial constructions of the Copyright Act of 1909 (“1909 Act”). For example, in the 1950s, the Cable television industry placed “community antennas” on top of mountains and transmitted local broadcast signals to subscribers using coaxial cables.¹³ At the time, this service was one of a kind and provided signals where hilly terrains or rural lifestyles made receiving broadcast signals difficult.¹⁴ Given that this practice increased viewership, Broadcasters were satisfied and recouped revenues primarily through advertising.¹⁵ However, copyright owners became dissatisfied with this service because cable imported distant signals and aired copyrighted content without paying appropriate licensing fees.¹⁶ This practice was particularly problematic because copyright owners did not receive any compensation for the increased viewership of their

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Indirect Infringement, CORNELL UNIV. LAW SCHOOL, LEGAL INFO. INST., http://www.law.cornell.edu/wex/indirect_infringement (last visited Nov. 1, 2014).

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Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 FED. COMM. L.J. 191, 193 (1990).

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See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 391–92 (1968).

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Cate, *supra* note 13, at 238.

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Id.

content; copyright owners also lost money because more houses switched from local broadcasters, the only companies paying for the copyright licenses, to cable.¹⁷

Unsatisfied copyright holders began voicing their concerns. Yet, the United States Supreme Court held no copyright liability for cable retransmissions of commercial television broadcasts to subscribers in two decisions: *Fortnightly Corp. v. United Artists Television, Inc.*,¹⁸ and *Teleprompter Corp. v. Columbia Broadcasting System*.¹⁹ In *Fortnightly*, the Court held that the cable company did not infringe the plaintiff's performance right because community antenna television ("CATV") systems did nothing more than "enhance the viewer's capacity to receive the broadcaster's signals" and therefore passive reception and retransmission did not infringe upon the copyright.²⁰ Six years later, in *Teleprompter*, the Court reaffirmed *Fortnightly* by holding that CATV systems reception and retransmission even from distant or secondary markets, did not constitute a performance under the 1909 Act because CATV passively rechanneled already-released material.²¹ As a result of these decisions, under the 1909 Act, cable

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Id.

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392 U.S. 390 (1968).

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415 U.S. 394 (1974).

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Fortnightly, 392 U.S. at 399.

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Teleprompter, 415 U.S. at 410.

television operators were free from copyright liability—this severely affected the market structure of television broadcasting and copyright licensing.²²

Since the 1909 Act failed to minimize cable’s impact on copyright holders, the Federal Communications Commission (“FCC”) became concerned about the unfair and uncompensated use of copyrights and the harm to local broadcasters.²³ Consequently, the FCC proposed regulations that required cable companies to obtain retransmission consent for content that distant broadcasting stations transmitted.²⁴ This effectively stunted growth in the cable industry as no broadcasting station gave consent because it would require fee sharing with copyright owners.²⁵

Congress further delayed the pronouncement of a new copyright act because of various pressures from the cable industry, the broadcasters, and the copyright owners.²⁶ By the early 1970s, no one was satisfied with the excessive and unworkable regulations.²⁷ In 1976, Congress stepped in and passed the Act, which represents the

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2-8 Nimmer on Copyright § 8.18(E).

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Cate, *supra* note 13, at 195–196.

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In the Matter of Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632, 650 (1979).

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Id. at 651.

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H.R. REP. NO. 1476, 94th Cong., 2d Sess. 89, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5703 [hereinafter cited as “House Copyright Report”].

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Leslie Swackhamer, *Cable-Copyright: The Corruption of Consensus*, 6 COMM/ENT L.J. 283, 288 (1983).

cable industry's compromise with the FCC to accept less restrictive regulations in exchange for partial copyright liability.²⁸ The Act primarily required cable companies to specify that cable retransmission is a public performance subject to full copyright liability.²⁹ After passing the Act, Congress found it impractical and unduly burdensome for cable companies to negotiate ad hoc copyright licenses; thus, Congress established a compulsory copyright license system for cable.³⁰ In providing this compulsory licensing system to the cable industry, Congress subsidized the cable industry by recognizing the public demand for cable and its potential benefits. This allowed the nascent cable industry to survive beyond copyright law.

To understand how copyright law almost eliminated the cable industry, it is important to look at the language provided in the Act. The performance right under the Act departs from prior law because Section 101 defines the right to “perform the . . . work publicly” as showing a motion picture or other audiovisual work’s images or making its sounds audible “by means of any device or process” at a place open to the public.³¹

Since the advancement of digital transmissions, Congress revised the Act several times to reflect the applicability to cable systems. First, relating to television

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See Cable Television Report and Order, 36 F.C.C. 2d 143, 165–68 (1972).

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Cate, *supra* note 13, at 202.

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Id.

31

17 U.S.C. § 101 (2014).

programming, Congress defined the word “perform” to mean any provider “showing an image in any sequence” as a performance.³² Then, Congress clarified the term “publicly” in two clauses. The first clause covers performances *in* public places, while the second, the “Transmit Clause” covers transmission of performances either (1) *to* public places or (2) “to the public.”³³ The Transmit Clause has been under fire for a lack of clarity ever since Congress wrote it.³⁴ The Transmit Clause states that performing a work publicly includes:

[T]o transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same or different times.³⁵

The legislative history is instructive in understanding this Clause; it explains that public performance includes not only an initial rendition or a showing, but also any further act that transmits any rendition of the work to the public.³⁶ Thus, a singer is performing when he or she sings a song, a cable television system is performing when it retransmits a broadcast to its subscribers, and an individual is performing whenever he or she turns on

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Id.

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See generally, John Kheit, Public Performance Copyrights: A Guide To Public Place Analysis, 26 RUTGERS COMPUTER & TECH. L.J. 1 (1999).

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Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 468 (1984) (Blackmun, J., dissenting).

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17 U.S.C. § 101 (2014).

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H.R. Rep. No. 94-1476, at 63 (1976).

a television receiving signals.³⁷ Although all of these acts are considered performances, a performance alone is not actionable under the Act. For infringement to occur, one must perform in a public place or to the public.

Congress' purpose behind enacting the Transmit Clause was to make the activities of cable companies outside the scope of copyright. But, to protect innovation and the public, and help cable companies avoid unequal negotiations with copyright holders, Congress simultaneously adopted Section 111.³⁸ Section 111 of the Act grants eligible cable systems a compulsory license in exchange for copyright royalty payments for the use of distant network transmissions.³⁹ Although Section 111 defines a cable system broadly enough to include retransmission carriers, Congress limits the compulsory license only to cable systems.⁴⁰ Because of the compulsory licensing and technological advancements, the cable industry has evolved into more than just a method to aid broadcast reception in rural areas—it is now a viable communications medium.⁴¹

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Id.

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Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc., 777 F.2d 393, 396 (8th Cir. 1985).

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Local signals need not be paid for, because their retransmission does not damage the copyright holder. House Report, *supra* note 26, at 90, reprinted in 1976 U.S. Code Cong. & Ad. News at 5704.

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M. Nimmer, *Nimmer on Copyright* § 8.18[B], at 8-196 to 8-197 (1982)(stating intent of Congress, to provide for liability for the retransmission of a copyrighted work); 17 U.S.C. § 111(c)-(d) (Supp. V. 1981).

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Timothy Wu, *Copyright's Communications Policy*, 103 Mich. L. Rev. 278, 312 (2004); *see* Cable Television Consumer Protection and Competition Act of 1992, 47

B. Courts Defining the Transmit Clause

While Congress enacted the Act during a time of analog technology. Since then, courts have addressed the numerous advances in technologies.⁴² In 1983, the Supreme Court upheld the use of Betamax recorders, an early version of the VCR, to allow television viewers to time-shift and record programs to view later.⁴³ The Court did not find the Copyright Act to prohibit television viewers from time-shifting content, nor did it find anything that would prohibit the sale of time-shifting devices because of fair use.⁴⁴ Section 107 of the Act, fair use, excepts time-shifting technology because of its “substantial non-infringing uses.”⁴⁵ The four-factor fair use test establishes that if an individual user can establish a fair use defense, then her conduct cannot base secondary infringement on facilitating that use for a manufacturer.⁴⁶

U.S.C. 521(a)(2)-(5) (2000) (detailing the increase in cable viewership and noting that “the cable television industry has become a dominant nationwide video medium”).

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See, e.g., Mitchell Zimmerman & Chad Woodford, Cartoon Network v. Cablevision--Buffer Reproductions Are Not Infringing Copies, Holds Second Circuit In “Remote” DVR Case, 13 No. 8 CYBERSPACE LAW. 9 (2008) (summarizing the court's reasoning to uphold the DVR after courts upheld a traditional VCR).

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See generally Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

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Id. at 448.

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Sony, 464 U.S. at 442.

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Id.

In 2008, the Second Circuit analyzed the Transmit Clause in *Cartoon Network LP, LLLP v. CSC Holdings, Inc. (“Cablevision”)*⁴⁷ and explained that a performance is “public” only when the audience receiving the transmission is not an individual, but multiple members of the public.⁴⁸ The court upheld cloud-based RS-DVRs where each individual subscriber created a unique copy or recording that constituted a private performance because *Cablevision* was not sharing the sole original copy publically by definition.⁴⁹ Another Second Circuit court decision discussing the legality of *Cablevision’s* operations further clarified, “if 10,000 Cablevision customers wished to record the Super Bowl, Cablevision would create 10,000 copies of the broadcast, one for each customer.”⁵⁰ Thus, *Cablevision* recognized that the Transmit Clause renders legally irrelevant the location of customers during a performance.⁵¹

To determine who or what constitutes as “the public” under the Transmit Clause, the court focused on the transmission and its potential audience, not the original telecast, because the potential audience for every copyrighted work is the public.⁵² The court then

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Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121 (2d Cir. 2008).

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Id. at 140.

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Id.

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WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 686 (2d Cir. 2013).

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Id. at 687.

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Id.

interpreted the law to not aggregate multiple transmissions of the same underlying work if each transmission was made to an individual not the “public” because aggregating all performances together would render the “to the public” language in the Transmit Clause moot.⁵³ This interpretation of the Transmit Clause has caused various companies, including Aereo, FilmOn LLP, and ivi, Inc. to design inventions according to the *Cablevision* decision’s requirements.⁵⁴

C. Internet TV Woes

Although online services like Hulu and Netflix originally provided only previously-aired content, the online streaming industry has since changed.⁵⁵ Today, Netflix and Amazon produce their own original series and provide quality original content.⁵⁶ Netflix’s Chief Content Officer, Ted Sarandos explained that developing its own programming allows Netflix to avoid huge marketing costs.⁵⁷ Unlike serialized dramas on broadcast TV, which require constant advertising, the original content strategy

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Cablevision, 536 F.3d at 135-37.

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See ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498(2014); Fox TV Stations, Inc. v. FilmOn X LLC, 968 F. Supp. 2d 134 (D.D.C. 2013); WPIX, Inc. v. IVI, Inc., 691 F.3d 275 (2d Cir. 2012).

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See generally, Eric Sherman, *3 Ways Streaming Video Will Change the TV Industry*, CBS MONEY WATCH (Mar. 31, 2011, 7:13 AM), <http://www.cbsnews.com/news/3-ways-streaming-video-will-change-the-tv-industry>.

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Alex Ben Block, *Netflix’s Ted Sarandos Explains Original Content Strategy*, THE HOLLYWOOD REPORTER, (Apr. 7, 2012, 11:26 AM), <http://www.hollywoodreporter.com/news/netflix-ted-sarandos-original-content-309275>.

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Id.

requires a one-time investment to draw users instead of weekly marketing.⁵⁸ Consequently, Netflix has more money to spend on buying more content and making premium content available for streaming.⁵⁹ Other online content providers such as Amazon, HBOGo, and more recently Yahoo! are following suit. Changes to content production and marketing are creating competitive alternative programming to the conventional TV outlet.⁶⁰

With these changes, more than sixty years after the advent of cable, the fledgling Internet TV industry—in a similar position to the cable industry in 1976—demands a rewrite to the copyright laws for much of the same reasons as when cable caused the passage of the Act.

Aereo is at the center of this debate.⁶¹ Unlike Netflix and Hulu, Aereo allows its users to watch and record live broadcast television over the Internet and store up to twenty hours of recorded content on cloud servers.⁶² Aereo's system allows subscribers

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Id.

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Id.; Eric Deggans, *Netflix Snaps Up TV Shows Rejected By Networks*, NPR (Mar. 6, 2015, 5:03 AM), <http://www.npr.org/2015/03/06/391149256/netflix-snaps-up-tv-shows-rejected-by-networks>; Netflix is not only investing money in rescuing shows that have been on broadcast networks and cable such as *Arrested Development* and *The Killing*, but Netflix is also releasing a show like *Unbreakable Kimmy Schmidt*, which was originally made for NBC. *Id.*

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Id.

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See AEREO, www.aereo.com (last visited Jan. 23, 2014).

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WNET, Thirteen v. Aereo, Inc., 712 F.3d at 681.

direct control over a single personal antenna available from thousands of dime-sized antennas that are dedicated to capturing over-the-air broadcasts.⁶³ A brief delay in the “watch” function ensures that the television program is not actually transmitted live.⁶⁴ This delay is important because it allows Aereo to be within the judicial interpretation of time-shifting technologies.⁶⁵

Upon user request, Aereo sends the end-user a unique copy of the designated program to view on any Internet-connected device.⁶⁶ By assigning each user an individual antenna, Aereo repurposes an old technology to avoid retransmission liability by transmitting a series of private, unique performances.⁶⁷ The individual antennas create individual copies of each program and the private copy is only available to the particular subscriber who selected the broadcast.⁶⁸ Aereo functions as a combination of “a standard TV antenna, a DVR, and a Slingbox-like device.”⁶⁹

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Id.

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Id.

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Timeshift is considered fair use. *See generally* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

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WNET, Thirteen v. Aereo, Inc., 712 F.3d at 682.

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See Adrienne Jeffries, *Who’s Afraid of a Little Live TV? Why Streaming Service Aereo Scares the Broadcast Industry*, VERGE, (Nov. 13, 2014, 9:50 AM), <http://www.theverge.com/2012/11/13/3628402/aereo-streaming-live-tv-broadcasters>.

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WNET, Thirteen v. Aereo, Inc., 712 F.3d at 682–83.

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Broadcasters are dissatisfied with this invention because Aereo is able to exploit their content without paying licensing fees.⁷⁰ Furthermore, compared to the average cost of basic cable at eighty-six dollars per month, Aereo offers over-the-air broadcasts to consumers for just eight dollars per month.⁷¹

As with cable, Betamax, VCRs, and DVRs, Broadcasters sued Aereo for copyright infringement.⁷² The United States District Court for the Southern District of New York found that *Cablevision* controlled and that the broadcasters “failed to demonstrate [that] they are likely to succeed in establishing that Aereo’s system results in a public performance.”⁷³

The Court of Appeals relied on *Cablevision* to establish “four guideposts” to interpret the Transmit Clause and determine that Aereo did not publically perform.⁷⁴

Id. at 682; “Slingbox is a hardware device that transmits signals from a cable or satellite television connection to a personal computer over the Internet. The device, which is manufactured and distributed by Sling Media, is intended for TV placeshifting with individual computers.” *available at* <http://whatis.techtarget.com/definition/Slingbox>.

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See Associated Press, *Fox Exec: “We Can’t Sit Idly by and Let [Aereo] Steal Our Signal”*, ENT. WKLY. (Nov. 9, 2014, 9:23 AM), <http://insidetv.ew.com/2013/04/09/fox-exec-we-cant-sit-idly-by-and-let-aereo-steal-our-signal> (describing how broadcast networks have threatened to take their networks off-the-air and make them subscription only).

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Id.

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Id.

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Am. Broad. Cos. v. Aereo, Inc., 874 F. Supp. 2d 373, 396 (S.D.N.Y. 2012).

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WNET, Thirteen v. Aereo, Inc., 712 F.3d at 689.

First, the Transmit Clause considers the potential audience by asking whether the transmission is “capable of being received by the public; the transmission is not a public performance if an individual user views it.”⁷⁵ Second, the Transmit Clause does not aggregate the individual performance with the original performance, which means that it does not matter if the public is capable of receiving the original work; only the audience for the individual transmission matters.⁷⁶ Third, if a single copy generates a transmission for multiple users, then the transmissions are public performances even if only one individual receives it.⁷⁷ Fourth, “any factor that limits the potential audience of a transmission is relevant” to the Transmit Clause analysis.⁷⁸

Alternatively, the Central District of California District Court interpreted the Transmit Clause by focusing on the commercial nature of the transaction to determine if the transmission infringed the performance right.⁷⁹ For example, a district court in California granted a preliminary injunction against a DVD rental company that streamed movies online because the enterprise was commercial in nature and unlike *Cablevision*

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Id. (citing *Cablevision*, 536 F.3d at 135).

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Id. (citing *Cablevision*, 536 F.3d at 135-38).

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Id. (citing *Cablevision*, 536 F.3d at 137-38).

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Id. (quoting *Cablevision*, 536 F.3d at 137).

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Fox TV Stations v. BarryDriller Content Sys., 915 F. Supp. 2d 1138 (C.D. Cal. 2012).

where an individual copy for each individual user existed; here, a single DVD was used for multiple users.⁸⁰

In 2012, the United States District Court for the Southern District of California also rejected *Cablevision*'s reasoning and enjoined Aereokiller, a similar system to Aereo, because it was a commercial enterprise and its operations required royalty payments.⁸¹ On the other hand, California case law suggests that a court must interpret any transmission as open to the public if the transmission is of a commercial copyrighted work that was initially open to the public.⁸²

More recently, however, the Central District of California District Court refused to extend *Aereo* to Dish Network's technology and affirmed the denial of Fox Broadcasting's motion for preliminary injunctive relief against Dish Network's online streaming services such as Dish Anywhere and Hopper Transfers because Fox did not suffer any irreparable harm.⁸³ Dish Network argued that the *Aereo* decision carved out exceptions for subscribers sending content they already owned to a different device.⁸⁴

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Warner Bros. Entm't v. WTV Sys., 824 F. Supp. 2d 1003, 1010 (C.D. Cal. 2011). *But cf. BarryDriller*, 915 F. Supp. 2d at 1145 (9th Circuit also upheld denial of preliminary injunction against Dish networks in a suit brought by Fox, on the basis that even though US had decided *Aereo*, Fox failed to show irreparable harm if Preliminary Injunction not granted).

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BarryDriller, 915 F. Supp. 2d at 1145.

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On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 790 (N.D. Cal. 1991).

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BarryDriller, 915 F. Supp. 2d at 1138.

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D. *ABC, Inc. v. Aereo, Inc.*

To resolve this circuit split, on June 25, 2014, the United States Supreme Court reversed the Second Circuit Court of Appeals' decision in *ABC, Inc. v. Aereo, Inc.*⁸⁵ The Court restricted their inquiry to two parts: "does Aereo 'perform' at all? And ... if so, does Aereo do so 'publicly'?"⁸⁶

The Court stated that the Act's language alone does not indicate when an entity performs or transmits and when it merely supplies the equipment for another to perform.⁸⁷ However, the Court concluded that when the language is read together with the Act's purpose, "[a]n entity that engages in activities like Aereo's performs."⁸⁸

To understand the Act's purpose, the Court turned to the Act's legislative history and stated that Congress enacted the Act to overrule *Fortnightly* and *Teleprompter*.⁸⁹

Gina M. McCreadie and Troy K. Liberman, *Ninth Circuit refuses to extend Aereo to Dish Network's technology*, INTELLECTUAL PROPERTY LAW ALERT: NIXON PEABODY LLP (July 15, 2014), http://www.nixonpeabody.com/files/170210_Intellectual_Property_Alert_15JULY2014.pdf.

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134 S. Ct. 2498.

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ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2504 (2014); The Court remanded on all other issues. *Id.*

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Id.

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Id.

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The Court also asserted that the Act adopted the Transmit Clause and Section 111 because Congress intended to bring cable systems within the scope of the Copyright Act.⁹⁰ Consequently, the Court concluded that because “Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach,” technological differences were not enough to overlook Congress’s purpose, which was meant to target companies like Aereo.

Considering whether Aereo performed publically, under the Transmit Clause, the Court noted that the technological differences of Aereo’s system did not distinguish it from cable systems, which perform publically according to Congress’ regulatory objectives.⁹¹ Further interpreting the language of the Transmit Clause, the Court posited that “[t]he fact that a singular noun (‘a performance’) follows the words ‘to transmit’” does not mean that an entity is not liable when it transmits a performance through several transmissions of the same work instead of one transmission.⁹² Thus, an entity publically performs when it communicates a performance to people, “regardless of the number of discrete communications it makes.”⁹³

Id.

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Id. at 2506.

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Aereo, 134 S. Ct. at 2509.

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Id. at 2499.

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Id.

Additionally, the Court found that because the Act applies to transmissions “by means of *any* device or process,” user-specific copies are a means of transmission.⁹⁴ The Court adopted this rationale because of Congress’s limited understanding of “devices” at the time of writing the Act. In 1976, devices that could transmit audiovisual content included television sets and movie projectors. Although Congress included “any device” thwarting future inventions from transmitting, in 1976, Congress had not envisioned the boom of the digital era and consumer dependence on digital devices. Finally, the Court limited its holding by reasoning that Aereo’s performance does not determine the performance of other providers in a different context.⁹⁵

Dissenting, Justice Scalia, joined by Justice Thomas and Justice Alito, concluded that Aereo did not perform at all. Justice Scalia criticized the majority for concluding a performance by adopting a “looks-like-cable-TV” standard, which is not found in the Transmit Clause.⁹⁶

In a section aptly titled “Guilt by Resemblance,” Justice Scalia discussed what he called majority’s “trio of defects” in reasoning.⁹⁷ First, the dissent noted that the majority’s interpretation of Congress’s purpose is based on a faulty method of analyzing

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Id.

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Id. at 2510.

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Aereo, 134 S. Ct. at 2515 (Scalia, J., dissenting).

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Id.

select portions of the legislative history.⁹⁸ Second, the dissent distinguished CATV systems which “captured the full range of broadcast signals,” from Aereo’s system that “transmits only specific programs selected by the user, at specific times selected by the user.”⁹⁹ The dissent found this to be significant because, in 1974, cable systems selected specific programs to import and were not merely passive carriers.¹⁰⁰ Lastly, the dissent rebuked the majority for replacing the bright-line volitional conduct test to determine direct liability of copyright infringement with a “looks-like-cable-TV” test.¹⁰¹ In doing so, the majority also conflated direct infringement and secondary infringement.¹⁰²

The networks like ABC, NBC, CBS, in their complaint stated that Aereo directly infringed, but to make a claim for direct infringement, the significant inquiry is *who* is performing.¹⁰³ To find a defendant directly liable, a volitional act that violates the Act is necessary.¹⁰⁴ The dissent bolstered this proposition by stating that the Act “defines

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Id.

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Id.

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Id.

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Id. at 2516.

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Aereo, 134 S. Ct. at 2515. (Scalia, J., dissenting).

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Id.

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Id.

‘perform’ in active, affirmative terms.”¹⁰⁵ Thus, to find Aero directly liable, Aereo must be the one performing. However, since Aereo remains inert until Aereo’s “subscribers log in, select a channel, push the ‘watch’ button”, Aereo does not perform; the users directly perform.¹⁰⁶

Justice Scalia analogized Aereo to “a copy shop that provides its patrons with a library card,” because Aereo does nothing except respond to the customer’s activities.¹⁰⁷ Similarly, a copy shop’s culpability can only be that of secondary infringement because the customer who chose the content and activated the copy function would be directly liable.¹⁰⁸ Unlike video-on-demand services that actively select and arrange the content, Aereo simply allots an antenna to an individual user, and the user chooses and selects from any freely available content.¹⁰⁹

Consequently, Justice Scalia found that the majority distorted the Copyright Act to reach their outcome.¹¹⁰ Justice Scalia also correctly pointed out that the Court was opening the door to multiple litigation quibbles about which technologies would fall within or outside the statute because of their adoption of the vague “looks-like-cable-TV”

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Id.

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Id.

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Id. at 2513.

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Aereo, 134 S. Ct. at 2514. (Scalia, J., dissenting).

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Id.

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Id. at 2517.

standard.¹¹¹ To conclude, Justice Scalia commented, “It is not the role of the Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes.”¹¹²

Part III: Reasons for Congress to Amend the Copyright Act

Allowing companies to design technologies that comply with copyright laws is precisely what Congress intended the existing laws to do. Our legal system should not punish those who deliberately follow the rule of law and rely on the law’s predictability. *Aereo* did just that. Instead, Congress, not the courts, should reexamine the law against the new technology and write laws that would facilitate a different result.

A. Regulatory Reasons

1. No Predictability in the Law/Statutory Interpretation Inconsistency

Since the enactment of the Transmit Clause (the “Clause”), various court opinions have turned on how to interpret the language in the Clause. While the Supreme Court in *Aereo* applied a “looks-like-cable-TV” test, other courts have adopted different methods to interpret the Clause.¹¹³ This interpretation problem is causing a failure of our legal system’s values that stress the importance of predictability because fairness and equity require consistent results in similar cases and circumstances.¹¹⁴

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Id.

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Id.

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Compare Aereo, 134 S. Ct. at 2516 (Scalia, J., dissenting) *with Cablevision* 536 F.3d at 121 *and BarryDriller*, 915 F. Supp. 2d at 1145.

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The lack of clarity in the language of the Clause is evident from the five different interpretations it has sprouted in three courts: 1) the Supreme Court majority's decision in *Aereo*; 2) the *Aereo* dissenting opinion; 3) the Second Circuit's interpretation; 4) Judge Chin's opinion in dissent; and 5) the Ninth Circuit's interpretation.¹¹⁵ The Court of Appeals for *Aereo* and *Cablevision* focus on the term "performance" when interpreting the phrase "capable of receiving the performance or display."¹¹⁶ Judge Chin in his dissent emphasizes that the correct interpretation of the Clause rests on the interpretation of the language "any device or process."¹¹⁷ Although the Supreme Court decision should have resulted in a final interpretative method for lower courts to follow, the uncertainty and conflicting method suggested by the Supreme Court is only going to create further confusion.¹¹⁸ Further, the Supreme Court's suggested standard would

See, e.g., *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J. dissenting) ("In most matters it is more important that the applicable rule of law be settled than that it be settled right."); Roger Cotterrell, *The Politics Of Jurisprudence: A Critical Introduction To Legal Philosophy* 114 (1989) at 133, 148, 192, 196-97 (importance of predictability to Franz Neumann, Lon Fuller, John Finnis, Karl Llewellyn, Jerome Frank); *id.* at 227-28 (problem of "predicting how doctrine will be interpreted by judges and other legal authorities faced with the task of applying it in new situations.").

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See generally, *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014); *Aereo*, 134 S. Ct. at 2516 (Scalia, J., dissenting); *Cablevision* 536 F.3d at 121; *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 697 (Chin, J., dissenting); *BarryDriller*, 915 F. Supp. 2d at 1145.

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See Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 OR. L. REV. 505, 530 (2010).

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WNET, Thirteen v. Aereo, Inc., 712 F.3d at 697 (Chin, J., dissenting).

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134 S. Ct. at 2516 (Scalia, J., dissenting).

hinder developing technologies because of a lack of reliability in the law. Even the Court, during oral arguments seemed confused as to what standard would apply.¹¹⁹ Justice Sotomayor agreed that Aereo fit the definition of a cable company, but she further questioned that if the Court found Aereo to be a cable company would they be allowed to get compulsory licensing that other cable companies receive.¹²⁰ However, nothing in the Supreme Court's opinion says that Aereo should be entitled to compulsory licensing.¹²¹

2. *Effect on Emerging Technology*

The standard adopted in *Aereo* also implies that no “clear” standard exists for determining when a technology company, rather than the user, has engaged in volitional conduct. As Justice Scalia correctly noted the majority opinion's improvised standard will “sow confusion for years to come,” because this unclear method would affect most cloud-computing companies negatively even though the Supreme Court suggests otherwise.¹²²

The plain meaning adoption of *Aereo*'s decision, which finds Aereo to be an integrated system that is not in line with copyright, would affect cloud-computing companies that are similar to Aereo because they use shared pools of configurable

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Transcript of Oral Argument at 3–4, *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2504 (2014), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-461_o7jp.pdf.

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Id.

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Id.

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134 S. Ct. at 2516 (Scalia, J., dissenting).

computer resources. Like all cloud-based platforms, Aereo allows some of the same physical equipment to be used independently by multiple consumers, which decreases waste and cost. Consumers increasingly rely on remote equipment to store and access online files, including personal copies of copyrighted content like songs and videos.

The Court implied that the relevant “performance” for the purposes of the Transmit Clause is the original broadcast, rather than the individual transmission.¹²³ This interpretation aggregates all individual transmissions of a program by individual consumers using Aereo.¹²⁴ Justice Scalia in his dissent noted that if the Court extended this aggregation, then it would turn all cloud storage providers into infringers because such aggregation blatantly disregards the premise that consumers have a long-established right to make personal copies for free. He also pointed out that the Court failed to account for the “salient differences” between cable and Aereo.¹²⁵ This is an important distinction because Cable companies act deliberately and forward a full range of broadcast signals to all subscribers at all times, whereas Aereo transmits “specific programs selected by the user, at specific times selected by the user.”¹²⁶ Yet again, the Court’s interpretation jeopardizes cloud technologies that are more like Aereo’s passive business model than cable.

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Aereo, 134 S. Ct. at 2513.

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Id.

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134 S. Ct. 2498, 2515. (J. Scalia, Dissenting).

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Id.

Justice Scalia also suggests that this meaning actively imperils the use of cloud technologies to store and access copyrighted content because whenever two users of a cloud-based drive separately play a song stored on the server, the provider would be liable for publicly performing by transmitting the same underlying performance to multiple members of the public even though these are separate copies.¹²⁷ According to him, this makeshift rule will take “decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment.”¹²⁸ Following, the legality of cloud-storage technology will remain in flux because of the “the imprecision of its result-driven rule”.¹²⁹

Although the Court did imply that their decision was narrow and confined to “looks-like-cable-TV” type inventions, it did not explain why the performances enabled by cloud storage services are “private” under this reading. Hence, the Court’s solution is unworkable to cloud storage services. By way of example, if a consumer watches a video uploaded on Google Drive, while any other consumer is watching the same video on her own personal account on Google Drive, then the Court would find Google Drive liable for a public performance. This decision places a heavy burden on storage companies to avoid liability because these companies would have to monitor the content stored on its system for its use.

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Id.

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Id.

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Id.

The *Aereo* decision provides no guidance regarding how cloud computing companies should configure their equipment to avoid being directly liable for their consumer's use of that equipment.¹³⁰ Cloud technologies generate “enormous efficiencies through economies of scale, allowing users to benefit from reduced cost and increased reliability,” and “provide[] substantial data portability, permitting a user access to his or her data via any device with an Internet connection.”¹³¹ Cloud technologies are also widespread and quickly growing; annual spending has surpassed \$50 billion, delivering savings to U.S. businesses projected to reach \$625 billion over the next five years.¹³² Although this decision vows not to directly impact cloud companies, it nevertheless causes confusion as to the future interpretations of the Transmit Clause as applicable cloud technology.

B. Political Reasons

1. Consumer Choice

Copyright law is not only concerned with protecting rights but also with providing maximum benefits for the public.¹³³ Today's consumer choices reflect the demand for services such as Aereo. Increasingly, consumers are moving towards Internet television simply because most cable owners do not have the time to watch every channel that

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See Brief for Respondent at 45, *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2504 (2014) (No. 13-461) (citing *Amicus Brief* CDT Br. 17-20; BSA Br. 20, 28).

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Id. at 49 (citing *Amicus Brief* BSA Br. 3).

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Id. (citing *Amicus Brief* BSA Br. 11-12 and *Cablevision* Br. 14).

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Sony, 464 U.S. at 431–33.

comes with their bundle nor the money to pay the expensive bill.¹³⁴ Internet TV supplemented with services like Netflix and Hulu provide a convenient patchwork of services in a cost-effective manner.¹³⁵

Technology industry analyst Jeff Kagan says that “[f]or years, we’ve been complaining about the uncontrollable rising prices of cable television.” According to HBO Network CEO Jeff Bewkes, “[t]here’s a lot of people out there that want to drop multichannel TV, and just have a Netflix or an HBO”¹³⁶ This shift to Internet television reflects the consumer choice; it shows that they want to pay only for the few channels that they want to watch and are likely to watch.¹³⁷

Additionally, Internet television provides a service that is missing in all other applications (“apps”) – the ability to watch live sports.¹³⁸ Brian Proffitt, a technology

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Gerry Smith, *My Year Using Aereo: How A Dime-Sized Antenna Met My TV Needs*, THE HUFFINGTON POST (Sept. 11, 2013), http://www.huffingtonpost.com/gerry-smith/myyear-using-aereo_b_3745981.html.

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Brief for the Consumer Fed’n of Am. and Consumers Union as Amici Curiae Supporting Appellees at 9–10, *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013).

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Rebecca Greenfield, *HBO, Here Are Those Cord-Cutting Stats You Asked For*, THE ATLANTIC WIRE (last updated Aug. 12, 2012), <http://www.theatlanticwire.com/technology/2012/08/hbohere-are-those-cord-cutting-stats-you-asked/55292/>.

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Id. According to a Deloitte survey, “9 percent of people surveyed have cancelled their cable subscriptions within the last year.” In addition, the five million homes that Nielsen reported as being Zero-TV homes are coming from somewhere--most likely from the group of cable TV watchers.

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expert specializing in enterprise, cloud and big data, suggests that “sports are perhaps the biggest reason (on the content side) holding people back from switching away from pay TV.”¹³⁹ The ability to watch broadcasted games that are not covered by cable’s expensive media packages is a perk for Internet TV consumers.

Proffitt also states that “[i]n the transition from land lines to cell phones, it was the E911 service that made the decision for us: making sure emergency services knew exactly where we were calling from was very important.” Today, the ability for Internet television to provide secure news in times of national disaster might play an equivalent role in the transition. The Emergency Alert System serves as our current national public warning system. It allows broadcast stations, cable systems, satellite radio, Digital Broadcast Satellite (“DBS”) systems, participating satellite companies, and other service providers to receive and transmit presidential, state and local alerts, and emergency information directly to the public.¹⁴⁰ However, a few national disasters have shown that reliance on cable during national emergencies is now misplaced because physical repairs to affected cables take longer than restoring Internet connectivity.¹⁴¹ In the U.S., Internet-

Brian Proffitt, *Cable Companies Still Whistling Past The Cord-Cutting Graveyard*, READWRITE (last updated March 27, 2013), <http://readwrite.com/2013/03/27/pay-tv-broadcasting-sounds-of-self-denial#awesm=>.

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Id.

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Susan S. Kuo, *Symposium: Speaking in Tongues: Mandating Multilingual Disaster Warnings in the Public Interest*, 14 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3.

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See e.g., Zafar Anjum, *India's VSNL Helps Restore Internet After Cable Break*, NETWORK WORLD (Feb. 6, 2008, 9:37 AM), <http://www.networkworld.com/article/2283092/lan-wan/india-s-vsnl-helps-restore->

based services reflect greater resilience than any other telecommunications method.¹⁴² For example, during Hurricane Katrina and subsequent flooding in Louisiana in 2005, landlines, telephone circuits, the State Police radio system, and cellular phone networks all failed.¹⁴³ One local Internet Service Provider was able to maintain some Voice over Internet Protocol (VoIP) phone service even during the disaster, and the State Police used this to communicate over their intranet.¹⁴⁴ Thus, the availability of over the air broadcast waves and the Internet's robustness provides that Internet TV will always be an accessible medium in times of emergency because the loss of routing is an easier fix than the ubiquitous disruptions caused by physical cable damage.

C. Technological Reasons

1. Transmit Clause Does Not Apply To Current State Of Technology

In 1968, cable television's innovative technology warranted a change in the Copyright Act. Justice Abe Fortas in his dissenting opinion in *Fortnightly* summarized the problem, he stated, "the novelty of the use, incident to the novelty of the new technology, results in a baffling problem. Applying the normal jurisprudential tools – the words of the Act, legislative history, and precedent – to the facts of the case is like trying

Internet-after-cable-break.html; *see also* *Disrupted SAT3 Service Restored in West Africa*, BALANCING ACT (Aug. 21, 2009), <http://www.balancingact-africa.com/news/en/issue-no-468/Internet/disrupted-sat3-service-restored-in-west-africa>.

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Conundrum, 96 MINN. L. REV. 584, 617.

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Id.

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Id.

to repair a television set with a mallet.”¹⁴⁵ Once again, the same problem with the new technology of Internet TV is at the forefront with Congress’s inability to keep copyright legislation up to date in accordance with the speed at which technology has advanced. In 1968, the word “performance” in the Copyright Act of 1909 did not reflect the development of CATV.¹⁴⁶ Congress wrote the 1909 Act “in a different day, for different factual situations.”¹⁴⁷ Arguably, Congress did not write the 1976 Act keeping the technology of today in mind.

The 1976 Act “took over two decades to negotiate, and was drafted to address analog issues and to bring the United States into better harmony with international standards, namely the Berne Convention.”¹⁴⁸ Although, the Act was an accomplishment of its time, today the lack of contemplation for digital transmissions is evident: until 1998, online service providers were liable under copyright law for the actions of their subscribers that they had no control over.¹⁴⁹ To remedy that situation, Congress adopted

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Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 408 (1968) (Fortas, J., dissenting).

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Id. at 408.

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Id. at 404.

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The Register's Call for Updates to U.S. Copyright Law, 113th Cong. 44 (2013) (statement of Rep. Pallante, Chairman, H. Comm. on the Judiciary).

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See Press Release, Comm. on the Judiciary, Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), *available at* <http://judiciary.house.gov/index.cfm/press-releases?ID=1B5C521A-D006-B517-9949-43E692E1E52E> [hereinafter Goodlatte Announcement].

a piecemeal Internet overlay – the Digital Millennium Copyright Act (“DMCA”), which is still an imperfect standard because it was adopted long before cloud storage, automobile software, and personal tablets.¹⁵⁰

Part IV: Proposed Solution

With new technology emerging and judicial attempts struggling to plug the loopholes within the current Act, it is time for Congress to write a new Copyright Act. For our society, the Internet has been the most revolutionizing invention and it deserves its technological finesse and capabilities be accounted for in the law.¹⁵¹ While the entire Copyright Act requires a revision to incorporate the Internet, to address Internet TV in particular, Congress must specifically rewrite the public performance right. The ambiguities in the definition of “public,” “performance,” and “transmit” shows the need for clarification in the law. This feat could take years to come as a political gridlock hinders any congressional action.

1. *Short Term Solution: Compulsory License*

For now, a makeshift legislative remedy is required. Similar to cable, Internet television requires a licensing provision to protect innovations and ward off marketplace

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Maria A. Pallante, *Review And Reflection: Copyright Hearings And Related Discourse In The Nation's Capital*, 13 J. MARSHALL REV. INTELL. PROP. L. 487 (2014).

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See Peter Decherney, *Hollywood's Copyright Wars: From Edison To The Internet* 237, 236 (Columbia Univ. Press 2012); Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 323 n.52 (2013).

failure.¹⁵² With the *Aereo* Court holding Aereo-like technologies liable under the Transmit Clause because they look like cable companies, Congress should provide a similar subsidy to online television as it once provided for cable in the 1950s. Although the Supreme Court applied a “looks-like-cable-TV” standard for Aereo, nothing in the Court’s decision suggests that it should get a compulsory licensing that cable companies receive. A compulsory licensing scheme would allow compensation for broadcasters and serve consumer interest in receiving a la carte content.

In 2008, the Copyright Office looked into a compulsory licensing scheme for online broadcast videos.¹⁵³ Mary Beth Peters, the former Copyright Register, found the ability for companies to sidestep private negotiations troublesome.¹⁵⁴ However, she did note the success of Section 111 as an efficient mechanism to allow the cable industry to thrive.¹⁵⁵ Moreover, the principal finding in the report suggested that systems that use

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See Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act, and Illegal Streaming Before the H. Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary, 112th Cong. 1 (2011) (statement of Maria A. Pallante, Register of Copyrights).

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See Mary Beth Peters, Register Of The Copyrights, Satellite Home Viewer Extension And Reauthorization Act Section 109 Report 187–88 (2008). <http://www.copyright.gov/reports/section109-final-report.pdf>.

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See id. at 188.

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Id. Although the licensing for cable is no longer needed because the industry has grown significantly from 1976 and has the ability to enter into private negotiations.

Internet Protocol to deliver videos are substantially similar to cable systems that already use Section 111, and should be subject to the same statutory licensing paradigm.¹⁵⁶

This note does not suggest that Section 111 should be adopted for Internet broadcasting. The model is ill-suited for digital broadcasting because it does not consider the complexities of newer technology and is designed for controlling cable providers. Congress should adopt a new statutory licensing scheme for the Internet TV industry. The Internet's unique capabilities require licenses specified to protect the growth of future innovation, shield lower entry barriers for smaller innovators while adequately compensating copyright authors.¹⁵⁷ If innovations like Aereo are held liable, then the public loses content even though it fits into the statutory copyright scheme. Because Aereo looks and acts like cable, but is not considered cable, it does not reap the rewards as other cable providers, yet is regulated like cable without a statutory license.

Under *Sony Corp. of America v. Universal Studios, Inc.*, Broadcasters are not allowed to claim copyright royalties when a consumer accesses and makes a personal copy of the local broadcast because a personal copy is a quintessential fair use.¹⁵⁸ Further, Congress exempted cable systems from any obligation to compensate copyright

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Id. at xi. Provided that these systems abide by the same broadcast signal carriage statutory provisions and FCC exclusivity requirements currently applicable to cable operators.

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See Marvin Ammori, *Copyright's Latest Communication Policy: Content Lock out and Compulsory Licensing for Internet Television*, 18 COMMLAW CONSPECTUS 375, 415 (2010).

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464 U.S. 417 (1984).

holders when they retransmitted broadcast programming already available to cable subscribers over the air. Thus, Congress recognized that retransmission of programming within the original broadcast market “does not injure the copyright owner,” who “contracts with the [broadcaster] on the basis of his programming reaching [its audience] and is compensated accordingly.”¹⁵⁹ When Congress enacted Section 111, copyright holders could claim royalties only when cable system retransmitted local programming to a “distant” audience.¹⁶⁰ Royalties for local or national network programming are not available for copyright holders under Section 111.¹⁶¹

Congress has repeatedly intended not to include retransmissions of content that are already available and paid in the statutory licensing scheme.¹⁶² For example, in 1995, when Congress created a digital performance right in sound recordings it exempted retransmissions of broadcast radio within one hundred and fifty miles of the original broadcast.¹⁶³ In 1999, in Section 122 for satellite retransmission, Congress exempted royalties if the re-transmitters were offering the transmissions only to the local

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H.R.Rep. No. 94–1476, at 90 (1976).

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17 U.S.C. § 111(d)(3).

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Id.

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Id.

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See id. § 114(d)(1)(B)(i)–(ii).

subscribers, in-market, “because the works have already been licensed, and paid for with respect to viewers in those local markets.”¹⁶⁴

Congress continually has stepped in between the cable industry and broadcasters to regulate competition. Cable’s free reign over retransmission of local broadcaster signals once again caused Congress to interfere and create the Cable Television Consumer Protection and Competition Act of 1992 (the “Cable Act”), a cable-specific statute. Congress passed the Cable Act because of a lack of competition in the cable industry that caused the average monthly cable rates to skyrocket.¹⁶⁵ The Cable Act ensured that competitors such as satellite and wireless cable delivery systems, had access to popular cable programming that they had been denied in the past.¹⁶⁶ Further, the Cable Act allowed local broadcast stations two options either to negotiate for retransmission consent or to take guaranteed carriage under the “must carry” provision. Prior to this law, cable systems used broadcast signals without station consent and resold the signals to subscribers—making millions.¹⁶⁷ Retransmission consent requires cable systems to

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H.R. Conf. Rep. No. 106–464, at 92–93 (1999).

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LEGAL SOLUTIONS BLOG, *Today in 1992: The Cable Act is Passed Over President George H.W. Bush’s Veto* (Oct. 5, 2012), <http://blog.legalsolutions.thomsonreuters.com/legal-research/today-in-1992-the-cable-act-is-passed-over-president-george-h-w-bushs-veto>.

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Edward J. Markey, *Cable Television Regulation: Promoting Competition in a Rapidly Changing World*, available at <http://www.fclj.org/wp-content/uploads/2013/01/markey.pdf>.

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obtain permission from broadcasters before carrying their programming.¹⁶⁸ Congress enacted the Cable Act to prevent a competitive imbalance between the two industries and required that broadcasters could either keep their must carry status or enter into negotiations with cable operators.¹⁶⁹ Eventually, the Cable Act became a subsidy for the national broadcast networks.

Congress acknowledged that broadcasters' interest in their signals and the copyright holder's interest in the programming contained on the signal were distinguished and "[t]he principles that underlie the compulsory copyright license of Section 111 . . . are undisturbed by this legislation."¹⁷⁰ The Cable Act was not "intended to affect Federal copyright law."¹⁷¹

The new license scheme should reflect the current video programming marketplace and provide bright line rules for retransmission of digital signals. Additionally, the new license should look to the intent of Section 111.

At its inception, Section 111 served its purpose and made it easier for cable to clear programming rights carried on distant broadcast signals. Long ago, cable, as a

NATIONAL ASSOCIATION OF BROADCASTERS, *Protect TV Viewers and Allow Broadcasters to Continue Negotiating in the Free Market*, available at <http://www.nab.org/advocacy/issue.asp?id=1891>.

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Id.

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See generally 47 U.S.C. § 325(b).

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H.R. Conf. Rep. No. 102–862, at 76 (1992).

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S. Rep. No. 102–92, at 84.

nascent industry, needed the Section 111 subsidy to compete on even terms with broadcasters. Today, cable no longer requires such a subsidy, but rather Internet TV finds itself in a hostile marketplace because its existence threatens damage to the broadcast industry.

For the proposed new licensing scheme, Congress should allow Internet TV providers to retransmit local television signals on a royalty-free basis. This would provide local television broadcast to Internet TV users and promote competition between Internet TV providers and broadcasters. This approach would work well for the proposed licensing scheme because, “Congress has repeatedly determined that the retransmission of local television stations by cable systems and satellite carriers does not harm copyright owners where they are adequately compensated in their direct licensing agreements with broadcasters.”¹⁷²

The new license would update and harmonize existing statutory license by allowing fees only for distant signal and not local transmissions. Because the effect of local retransmissions is dubious and broadcasters are typically compensated through advertising and not the recipients of the broadcast, a license eliminating fees for local transmissions would not harm the broadcasters.

Financing of broadcast television is accomplished primarily through advertising and retransmission fees. Since Internet retransmission of broadcast content cannot remove the accompanying advertisements and it presents the content unaltered, a

broadcaster would not suffer because the intended audience would still be receiving the advertisements.

The loss of retransmission fees from cable companies would harm broadcasters. However, requiring broadcasters to swallow this cost in order to provide a public benefit and secure innovation would be a worthwhile exchange. Without the ability to stream content, the Internet TV industry will not be given the appropriate incentive to develop further. Although cost-effective services like Aereo may induce users to leave their traditional cable companies thereby resulting in a loss of retransmission fees for broadcasters, this result does not justify preventing the public from receiving their desired content because copyright holders denied retransmission permission. Allowing Internet TV to retransmit broadcasters' signals would greatly increase the flow of information. Local news, community building, sports, and critical information during emergencies would be more readily available for thirty million Americans that do not have access to cable or satellite.¹⁷³

A compulsory license would reduce the extent to which copyright ownership would monopolize the creations and access of innovations in that industry. Mitigation of monopolistic behavior is the strongest argument for adoption of the proposed compulsory licensing scheme.¹⁷⁴ A group of scholars asserts “[t]he general theory of a competitive

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See Television Viewers, Retransmission Consent, and the Public Interest: Hearing Before the Subcomm. On Commc’n, Tech., & the Internet of the S. Comm. on Commerce, Sci., & Transp., 111th Cong. 4, 17 (2010) (statement of Chase Carey, Deputy Chairman, Pres., & COO, The News Corp.).

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free market economy shows that monopoly will reduce overall welfare by providing distorted price signals to consumers, causing them to purchase the wrong combination of goods and services to maximize their welfare.”¹⁷⁵ A license would simply make the information more readily available for others to stimulate the production of more technology and innovation. The compelled licensing regime will reward the broadcasters while enabling subsequent Internet TV developers to innovate the available signals further without incurring deterrent costs or facing an entry barrier set by the copyright holder’s inability to negotiate.

This license would commence for a temporary five-year term, allowing reevaluation of the market in five years and allowing Congress time to test changes for the video programming industry on a smaller scale, which in turn would effectuate a successful rewrite of the Copyright Act. Such a license will cure the imbalance that has resulted from the *Aereo* decision, which effectively decapitated any hope for future innovations for Internet television.

2. ***Long Term Solution: “Device-Shifting” Fair Use***

This note also proposes that technological fair use should apply to *Aereo* and other similar technologies under the concept of “device-shifting.” Technological fair use

Alan M. Fisch, *Compulsory Licensing Of Blacked-Out Professional Team Sporting Event Telecasts (Ptsets): Using Copyright Law To Mitigate Monopolistic Behavior*, 32 HARV. J. ON LEGIS. 403 (1995).

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See Robert G. Harris and Thomas M. Jorde, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1128 (1977).

is a new sect of case law emerging from the fair use doctrine.¹⁷⁶ Technological fair use deals with not only the legality of certain uses of copyrighted works but also, the legality of emerging technologies that affect innovation and the U.S. economy.¹⁷⁷

Sony Corp. of America v. Universal City Studios, Inc. is the landmark case that found time shifting to constitute as technological fair use. In *Sony*, movie studios sued to block the sale of Sony's Betamax videocassette recorder (VCR), they argued that Sony was liable because its customers were making unauthorized copies.¹⁷⁸ The Supreme Court, in a 5-4 decision, held that home time-shifting recordings were permissible fair use and the VCR technology was legal because of its substantial non-infringing uses.¹⁷⁹ Thirty years ago, in *Sony*, the Court "came within one vote of declaring VCR Contraband" because the VCR technology had the directly threatened the television and movie industries.¹⁸⁰ If the *Sony* Court decided the other way, then billions of dollars in revenue for the VCR, Video Rental, and Video Camera markets would never have been realized.¹⁸¹ Broadcast Networks made similar calamitous predictions about Aereo and the

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Edward Lee, *Technological Fair Use*, 83 S. Cal. L. Rev. 797 (2010).

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Id.

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See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434–35 (1984).

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Sony, 464 U.S. at 442.

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Aereo, 134 S. Ct. at 2515 (Scalia, J., dissenting) (citing *Sony*, 464 U.S. at 441, n. 21).

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Court supported that conclusion by stifling technological innovation in their *Aereo* decision.¹⁸²

A finding of fair use in *Aereo* would have created an innovative legal standard. Fair use would have offered two things: (1) fair use would have obviated a compulsory licensing need, which could benefit not only *Aereo*, but also other entities and cloud technologies seeking to build similar programs; and (2) fair use would have provided copyright holders more mediums to display their work. Consequently, Congress should amend the Copyright Act to provide a bright-line technological device-shifting fair use exception.

In *Sony*, the Court made some influential pronouncements about personal use copying and the fair use doctrine that can be applied to the *Aereo* decision. Personal use copying includes things such as making time-shifted copies of television programs to watch them later or loading the music from a purchased CD onto one's computer.¹⁸³ Internet TV systems such as *Aereo* do nothing more than redirect or device-shift the broadcaster signals from the cable box to an iPad, computer, or device of your choice that has internet connection. Currently, such device-shifting technologies are readily

See 2000 U.S. Dep't of Commerce Statistical Abstract of the U.S.: The National Data Book 566 tbl.909 (reporting data on consumer spending on home video from 1993 to 2003); 1995 U.S. Dep't of Commerce Statistical Abstract of the U.S.: The National Data Book 572 tbl.899 (reporting data from 1985 to 1993).

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Id.

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See, e.g., Sony, 464 U.S. at 454–55 (holding that time-shift copying was fair use). *See generally* Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. Rev. 397, 402–06 (2003) (distinguishing between active and passive consumers).

available in products such as Slingbox, TiVo and others that provide retransmission of content across different devices.¹⁸⁴

While the VCR allowed society to watch programming at a later time, device-shifting technologies allow users to watch programming in different locations. Device-shifting technologies allow its consumers to make productive uses. Now users can evade the television box, and even geographic boundaries that restrict TV to the living room. These devices provide access to already purchased content or content that is freely available through over-the-air broadcasts, as in *Sony*.

Aereo shares similar functionality to the VCR and its successors like Slingbox. However, similar to the VCR, Aereo and other cloud technologies will face comparable challenges to legalize their inventions. Aereo only provides access to over-the-air broadcasts, which are public domain, but with the additional Internet streaming option.¹⁸⁵

While more consumers recognize the benefits of device-shifting, judicial decisions that threaten the future use of such technology are against the purpose and traditional intent of copyright law. Allowing courts to interpret the law in favor of broadcasters does nothing more than tip the balance towards broadcasters' monopolistic control under the copyright law. Thus, Congress should adopt a fair use legislative remedy that eliminates the discrepancies in copyright law.

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Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072 (9th Cir. Cal. 1999) (holding Space-shifting, the process of transferring content from one medium to another, as a fair use).

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Any paid for content available on Aereo should invite a compulsory licensing scheme to fulfill the demand for device shifting.

Technological fair use legislation would allow innovators to further improve technology, and the public would benefit with the innovations. Fair use should be applied uniformly in the technological area given the complexity of many cases. The fair use principles laid out in *Sony* require strengthening with Congress playing a more central role in advancing content and technology.

In strengthening the fair use doctrine for technology, Congress should make a definitive legislation that legalizes device-shifting fair use. By providing such an exception, Congress would promote a clear advancement of technology and limit the scope of the copyright owner's rights, in contrast to the tendency of current case law, which has broadened the reach of copyright holders.

Congress should adopt device-shifting fair use for similar reasons that time-shifting fair use was deemed acceptable. Under the fair use analysis, the burden of proving harm or an adverse effect on the market for the copyrighted work rests on the complainant. The *Sony* Court, in justifying time-shifting fair use, stated that advertising revenue would not be lost because advertisements would still appear on the recorded tapes.¹⁸⁶ Internet streaming of free over-the-air broadcast content adheres to the same logic. Aereo was taking advantage of free public airwaves and this cannot constitute copyright infringement absent a likelihood of harm. Even if courts are able to find some potential harm, their ultimate decision should rest on an interpretation of the Copyright Act, which encourages technological innovation not monopolies. Thus, a device-shifting

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464 U.S. at 453, n.36 (citing *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 468 (C.D. Cal. 1979)).

exception would create a positive impact on the manufacturer, the public, as well as advancements in technology.

Part V: Conclusion

The state of copyright law is insufficient and piecemeal judicial decisions are only adding to the confusion. The law is failing to keep up with the advancing technologies. These, technological advances are essential to our society. New technologies provide an incentive for investment and innovation. Consequently, protection of this technology is indispensable to protect the fruit of a copyright owner's labors. However, overprotection of technology is as harmful as under protecting it. It is critical that copyright law adequately keep pace with technological developments and society.

The *Aereo* decision may have stirred the pot regarding the legality of Internet streaming, but Congress should have the last word in the matter. Without statutory intervention, the *Aereo* decision has threatened newer technology and sent many technology providers searching for alternative loopholes to legally provide their much-needed services.

Congress has two options to satiate the purpose of the Copyright Act, which requires balancing the protection of copyrighted works against the incentive of creators to advance technologies. Congress can either allow a compulsory license for Internet TV, which would mitigate the monopolistic behavior of copyright holders and broadcasters. This proposed license is consistent with the purpose of the copyright laws and prior uses of compulsory licensing. Alternatively, Congress can enact technological fair use legislation that would allow technologies such as Aereo to develop more and allow subscribers a better option for television consumption. It is time that Congress must

reconsider the existing laws in the face of growing technology and speed up the inevitable television revolution.